"An appeal shall not operate as a stay of execution *or of proceedings* (emphasis provided) under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct."

We have examined rule 57 and we find that the word "or" does not appear therein and that the correct rule 57 reads:

"An appeal shall not operate as a stay of execution of proceedings under the decision appealed from unless the High Court or the Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct."

The learned judge was clearly mistaken resulting, in our opinion, in an erroneous construction as to the effect of the rule. We think we ought to point out this misquotation and wrong emphasis placed by the learned judge lest the same mistake might be repeated. In our opinion, the answer to such dilemma faced by the appellants in such a situation may be found in section 44(1) of the Courts of Judicature Act 1964.

Order accordingly.

Solicitors: *A.J. Ariffin, Chong & Harpal.*

CHAI KAH SIM v. ISHAK BIN SAAD

[S.C. (Salleh Abas L.P., Seah & Syed Agil Barakbah S.C.JJ.) December 2, 1985 & February 18, 1986]

[Kuala Lumpur – Federal Court Civil Appeal No. 244 of 1984]

Tort – Collision between motor lorry and motor-cycle – Parties found equally to blame – Question of fact – Appeal.

In this case there was an accident between a motor lorry driven by the appellant and a motor-cycle ridden by the respondent. The learned trial judge found both parties equally to blame and assessed the damages at 50% in favour of the respondent/plaintiff. The appellant appealed.

Held, dismissing the appeal: in this case the learned trial judge had made an inference from the facts, which was based on circumstantial evidence, both oral and documentary, which were sufficient and conclusive as to entitle the learned judge to make a proper inference. In the circumstances it was the only reasonable and irresistible inference. It is not proper for the appellate court to upset his finding. The respondent had proved that the accident was caused to some extent by the fault of the appellant.

SUPREME COURT.

Joga Singh Dhalliwal for the appellant.
Jodgis Singh Sandu for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): This is an appeal against the decision of the High Court Judge sitting in Ipoh, in the State of Perak. The appellant was the driver of motor lorry AX 3516 which was involved in an accident with motor-cycle AAF 7095 ridden by the respondent at the 24th milestone Kuala Kangsar/Ipoh main road on September 10, 1982 at about 11.50 a.m. The learned Judge found both parties equally to blame for the accident and accordingly assessed the damages at fifty per cent in favour of the respondent/plaintiff. The appellant being dissatisfied appealed against the decision on liability only but not against the decision on the quantum of damages.

The undisputed facts as accepted by the trial Judge were that the two vehicles were negotiating a sharp corner along the road approaching each other from the opposite directions. The motor-cycle was proceeding from Kuala Kangsar towards Ipoh and the lorry was travelling from Ipoh towards Kuala Kangsar. The respondent was negotiating a left-hand bend and the appellant a right-hand bend when the accident occurred. Immediately after the collision, the lorry came to a stop over the left edge of its side of the road facing towards Kuala Kangsar. The motor-cycle was lying in the middle of the road across the centre white line. Its front wheel and part of its body occupied its side of the road while the other half occupied the lorry's side of the road.

The parties gave conflicting versions of the manner in which the accident occurred as noted by the trial Judge. According to the respondent, he was riding his motor-cycle about two feet from the left edge of the road and while negotiating the bend he collided against the rear off-side wheel of the oncoming lorry. After that, he could not remember anything else. On the other hand, the appellant testified when approaching the bend he saw the respondent coming straight at his lorry. He tried to swerve to the left to avoid a collision but the respondent's motor-cycle collided against the front of the rear off-side tyre of the lorry. In the light of the contradictory versions, the learned Judge took into consideration the other available evidence, *viz.*, the sketch plan and photographs of

the scene showing the positions of the two vehicles after the accident and the police reports lodged by both parties to assist him in making his finding. In our view, he has applied the correct test.

It is common ground that the front part of the motor-cycle collided with the rear off-side tyre of the motor lorry when the two vehicles were negotiating the sharp bend. The learned Judge also accepted the appellant's evidence that as a result the motor-cycle bounced back and fell on the road.

The crucial issue was the point of impact between the two vehicles. The appellant's contention was that it happened on his side of the road somewhere at point 'D' on the sketch plan. The respondent claimed the collision occurred on his side of the road. The learned Judge however was of the view that the point of impact was somewhere near the centre of the road and not far from the place where the motor-cycle was found lying on the road. He stated in his grounds:

"The lorry was therefore somewhere near the centre of the road when the collision occurred. It could not be near the edge of the road as stated by the Defendant. In my view having regard to the position of the lorry it is probable that the Defendant was cutting across the corner as he took the right-hand bend. The collision occurred when his lorry was at an angle to the centre of the road and the front was facing diagonally to the left. The rear of the lorry was still at the centre of the road when the collision occurred."

It was submitted by the learned counsel for the appellant that the learned Judge erred in arriving at that conclusion on the ground that he had embarked upon a course of speculation as to how the collision occurred and that led him to conclude that the point of impact was somewhere near the centre of the road not far from the motor-cycle and not on the appellant's side of the road at point 'D' in the sketch plan.

With regard to the latter, the sketch plan shows point 'D' as a fresh scratch mark which is about 4 feet 8 inches away from the centre white line. The length of the scratch mark has not been given. However the distance from 'D' to 'E', the rear wheel of the motor-cycle lying in the centre of the road is about 35 feet. The learned Judge took these into consideration and concluded that point 'D' was too far away from the motor-cycle and could not be the point of impact. Although he did not say in so many words, the Judge's conclusion is substantiated by other material factors. First, the scratch mark 'D' could not have been made by any part of the motor-cycle during the collision because according to the appellant's own testimony his lorry did not drag the motor-cycle after the impact. Secondly, the motor-cycle collided with the front part of the rear off-side wheel of the lorry, bounced back and fell on the road. If both the motor-cycle and the respondent had been flung about 35 feet away, the result would have been disastrous. There would have been more damage to the motor-cycle and more serious injuries to the respondent. The damage to the motor-cycle as shown in the photo was mainly to the front part including the wheel which appeared to have buckled. There appeared to be no tell-tale mark on the off-side rear wheel of the lorry and for that matter on any other part. With regard to the respondent's injuries, the medical reports which were included in the agreed bundle of documents had not been filed in the appeal record. However, it was not disputed that the 65-year old respondent suffered from a dislocated shoulder and other injuries including inability to grip with his left hand. After the accident, he had to use a stick to walk for some time. We are also satisfied that the impact between the vehicles as indicated by the trial Judge was slight and not a direct and strong impact since it was probable in the circumstances of the case that both vehicles had slowed down in order to negotiate the sharp bend. The distance from the point of impact to the place where the motor-cycle and the respondent had fallen in the centre of the road as seen by the appellant, could not therefore be very far. After all, the distance between the heavily loaded lorry and the motor-cycle on the road after the accident as shown in the sketch plan is only about 7 feet 1 inch. (See 'E' to 'F' on page 39 of the Appeal Record). Thirdly, there were no debris along the line but were near the motor-cycle as seen from one of the photographs. Lastly, if at all the accident occurred on the appellant's side of the road, it could not be at point 'D' but somewhere before the starting of point 'D' slightly further inside the appellant's part of the road. That, in our view, is most improbable. With respect, therefore, we agree with the learned Judge that the point of impact could not be at point 'D' or any where near it on the appellant's side of the road.

Taking the above into consideration, we do not think that the trial Judge has embarked upon a course of speculation when he concluded that the lorry probably cut across the corner in taking the right-hand bend and the collision occurred when it was diagonally across the centre of the road. Although it was an inference from the facts, it was based on circumstantial evidence both oral and

documentary which, in our considered judgment, are sufficient and conclusive as to entitle the learned Judge to make a proper inference. It was in the circumstances the only reasonable and irresistible inference. He heard and saw the witnesses and was in a better position to determine their credibility and reliability. The appellant was cross-examined on the matter in his presence. He had made proper use of that advantage in considering the evidence as adduced. In the circumstances, it is not proper for us to upset his finding. We agree with him that the respondent in the court below had proven that the accident was caused to some extent by the fault of the appellant.

We therefore dismiss the appeal with costs and confirm the judgment of the court below.

Deposit to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *V.P. Nathan & Partners; Sandu & Co.*

KRISHNAMURTHY & ANOR. v. MALAYAN FINANCE CORPORATION BHD.

[S.C. (Salleh Abas L.P., Seah & Syed Agil Barakbah S.C. JJ.) December 2, 1985 & February 19, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 125 of 1985]

Practice and Procedure – Claim on guarantee in connection with sale of motor cars under hire-purchase agreement – Application for summary judgment – Application to sign final judgment for sum less than amount claimed – Credit given for value of motor vehicles repossessed – Delay in application – Satisfactory explanation given – R.H.C. 1980, O.14.

In this case the respondents had sued five defendants including the two appellants for the recovery of the sum of $66,303.89 which arose in connection with a business deal in which the respondents agreed to finance the sale of motor vehicles by N.K.M. Credit Sdn. Bhd. (the first defendant) to members of the public under hire purchase agreements. The other four defendants (including the two appellants) guaranteed to indemnify the respondents against any losses incurred or suffered. The respondents brought the action on December 3, 1983. The first defendant did not enter an appearance and judgment in default was entered against them. The other defendants entered appearance at different dates, the present appellants entering appearance on April 4 & 10, 1984 respectively. The respondents applied for final judgment on May 31, 1984. The sum for which judgment was sought to be signed was smaller than that originally claimed, as credit had been given for the value of vehicles repossessed. The defendants objected to the application for final judgment on the grounds: (1) that the amount claimed differed from the amount for which judgment was sought to be signed; (2) that there was delay in applying for the judgment. The Senior Assistant Registrar accepted both the objections and dismissed the respondents' application. On appeal to the High Court, the decision of the Senior Assistant Registrar was reversed. The two appellants appealed to the Supreme Court.

Held: (1) the difference between the amount claimed and the amount to be signed in the judgment was fully explained by the respondents to the effect that credit had to be given for the value of the cars which the respondents repossessed between the date of the writ and the date of the summons in chambers. There was no need to amend the statement of claim for the making of the adjustment;

(2) the application for Order 14 judgment must be made after an appearance had been entered and it could be made either before or after the delivery of defence provided that where it was made after delivery of defence, the plaintiff must explain the delay. In this case no defence was ever filed by the appellants and the other defendants. The delay in this case was not such as to inhibit the court from granting the respondent's application for an Order 14 judgment.

Cases referred to:

(1) *McLardy* v. *Slateum* (1890) 24 Q.B.D. 504.
(2) *Comptroller-General of Inland Revenue, Malaysia* v. *Weng Lok Mining Co. Ltd.* [1969] 2 M.L.J. 98.
(3) *Societe des Etains de Bayas Tudjuh* v. *Woh Heng Mining Kongsi* [1978] 2 M.L.J. 267.

SUPREME COURT.

Miss Bella Loo for the appellants.
K. Anandham for the respondents.

Cur. Adv. Vult.

Salleh Abas L.P. (delivering the Judgment of the Court): In the court below the respondents sued five defendants including the two appellants in this appeal for the recovery of a sum of $66,303.89 which arose in connection with a business deal in which the respondents agreed to finance the sale of motor vehicles by N.K.M. Credit Sdn. Bhd. (the first defendants) to members of the public under hire purchase agreements. As part of the deal the other four defendants (including the two appellants) guaranteed to indemnify the respondents against any losses incurred or suffered. This suit was commenced on December 3, 1983.

The first defendant did not enter an appearance and so a judgment in default was entered